Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (suing through his wife and litigation representative Wan Zafura bt Wan Kassim) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCvC)(W)-566–04 OF 2020 AND W-02(NCvC)(W)-572–04 OF 2020
HAS ZANAH MEHAT, SUPANG LIAN AND SEE MEE CHUN JJCA
29 DECEMBER 2021

Damages (Personal Injury or Death) — Appeal — Appeal against quantum — Plaintiff suffered serious brain injury at defendant hospital that left him in persistent vegetative state — Whether trial court failed to decide on correct life expectancy figure and multiplier for assessment of damages — Whether awards of trial court using wrong multiplier had to be revised upwards — Whether loss of earnings could not be awarded between date of injury and conclusion of trial as plaintiff failed to produce documentary proof of loss of income — Whether since plaintiff had been executive director of company before injury nominal monthly income figure could be used to award loss of future earnings — Section 28A(2)(c)(i) Civil Law Act 1956

The two appeals herein, one by Pantai Medical Centre Sdn Bhd ('PMC') and the other by Fareed Reezal bin Arund suing through his wife cum litigation representative ('the plaintiff') solely concerned the issue of damages awarded or not awarded by the High Court ('HC') in a medical negligence suit between the parties. The plaintiff was 44 years old when he suffered serious brain injury at PMC on 19 May 2015 which resulted in him being in a persistent vegetative state ('PVS'). The plaintiff's negligence suit was filed on 19 January 2016. The HC delivered its decision on 6 March 2020.

Held, unanimously, as follows:

(1) The HC decided the plaintiff's life expectancy to be ten years. Initially, after considering the testimonies of the expert witnesses for both parties, the HC judge took a conservative figure of 16 years which was the lower value of the plaintiff's expert witness's estimate of life expectancy. But the judge then went on to deduct four years from the 16. This was plainly wrong as it was without basis where after having already started at the lower range value to reflect the conservative view, the four years should not have been deducted. The HC judge was also wrong to have made a further one-third deduction for contingencies because the plaintiff's expert witness had already factored in the various contingencies before

arriving at the life expectancy figure of 16 years. The life expectancy and the multiplier should therefore be 16 years (see paras 8, 17, 24–26, 34 & 36–37).

(2) Applying 16 years as the multiplier, all of the HC's awards that had used ten years as the multiplier/life expectancy had to be varied upwards. The awards affected were (as listed in the Table of Damages annexed herewith) items 34–37, 46–48, 50–53, item D3 (travelling expenses) and item D4 (value of care by family members) (see paras 80, 82–83 & 85–92).

(3) With regard to special damages for the eight months between the date of injury (19 May 2015) and the date of filing of the action (19 January 2016), this court affirmed the HC's award of RM570,120.79 for hospital and medical expenses (item 1 in Table of Damages), RM26,850 for acupuncture and reflexology (item 7), RM9,350 for physiotherapy (item 8), RM68,000 for cost of care (item 9) and RM11,600 for home renovations (replacement of buckled tiles — item 10). The HC's award of RM240,000 (RM30,000 x 8 months) for loss of earnings (item 3) was set aside as the plaintiff could not produce any documentary evidence to support a claim for loss of earnings. Section 28A(2)(c)(i) of the Civil Law Act 1956 ('the CLA') required the plaintiff to prove that he was 'receiving earnings by his own labour or other gainful activity before he was injured'. For the same reason, the HC's award for loss of earnings of RM1,080,000 between the date of filing of the suit and the date of the HC's decision was also set aside (see item 14 of Table of Damages) (see paras 38, 40, 43–44, 63–65 & 67–69).

(4) With regard to those awards computed between the date of filing of the action and the date of the HC's decision — which was actually a period of 49 months and 16 days rounded up to 50 months but where the HC had wrongly used a multiplier of 36 months — the plaintiff's appeal to vary the awards by using the multiplier of 50 months was allowed. Accordingly, the amounts in items 13 and 15–18 in the Table of Damages annexed herewith were varied (see paras 58 & 70–72).

(5) The HC did not give any award for value of care given by the plaintiff's wife, SP2. In this appeal, the plaintiff sought an amount of RM762,000 (RM15,240 x 50 months). The RM15,240 was based on an hourly commercial nursing care rate for a month minus 25%. Since an award of RM16,000 (ie, about RM2,000 per month for eight months) was made for this item under special damages which was not appealed against by either party, this court would award the plaintiff the same figure of RM2,000 for 50 months giving a total of RM100,000. This would be a reasonable sum for the value of care given by SP2 (item 19 in Table of Damages) (see paras 73–76).

(6) With regard to medical equipment, appliances, medicine and nutrition, the amounts awarded were based on the lifespan of the equipment and the frequency of consumption or application of the medicines. Since the complaints of the parties related to the multiplier that was used, this court decided that where the lifespan of the thing in question was two years, the multiplier would be eight; for a lifespan of five years, it would be three; for a lifespan of eight years, it would be two and for a lifespan of ten years, it would also be two. Accordingly, items 20-33, 39, 40, 42 and 43 in the Table of Damages were adjusted by the use of the appropriate multiplier (see paras 78–79).

(7) The multiplier to compute the plaintiff's future loss of earnings was 5.5 (ie, 55 years minus 44 years (age when he was injured) divided by two as per s 29A(2)(d)(ii) of the CLA). The sum of RM30,000 per month determined by the HC was an appropriate nominal income on which to award the plaintiff loss of future earnings given that there was no dispute that he was an executive director of a company before his injury. The amount of RM1,980,000 (RM30,000 x 12 x 5.5) awarded by the HC was therefore confirmed (item D5 in Table of Damages) (see paras 50–51, 53 & 93).

(8) The HC's award of RM400,000 for pain and suffering and loss of amenities of life was not plainly wrong and was confirmed. Even though the distinction between damages for pain and suffering depended on the extent of the plaintiff's awareness and capacity for suffering, damages for loss of amenities would be awarded for the pain of deprivation — a substantial loss whether the plaintiff was aware or not. Hence, although the plaintiff was in PVS, the pain of deprivation of the loss of amenities whether or not he was aware of it was a substantial loss (item E in Table of Damages) (see paras 94–97).

(9) The plaintiff complained that the HC's award of RM50,000 for costs was manifestly low considering the number of days of trial and the extensive research put in by counsel. A sum of RM350,000 was suggested inclusive of RM65,063.12 as out-of-pocket expenses. This court was of the opinion that costs should include getting-up and out-of-pocket expenses and that a reasonable sum would be RM100,000 (last item in Table of Damages) (see paras 98–100).

[Bahasa Malaysia summary

Kedua-dua rayuan di sini, satu oleh Pantai Medical Centre Sdn Bhd ('PMC') dan satu lagi oleh Fareed Reezal bin Arund menyaman melalui isterinya dan wakil litigasi ('plaintif') adalah berkenaan isu ganti rugi yang dibenarkan atau tidak dibenarkan oleh Mahkamah Tinggi ('MT') dalam saman kecuaian perubatan antara pihak-pihak. Plaintif berusia 44 tahun ketika dia mengalami kecederaan otak yang serius di PMC pada 19 Mei 2015 yang mengakibatkan

dia berada dalam keadaan koma yang berterusan ('PVS'). Saman terhadap kecuaian plaintif telah difailkan pada 19 Januari 2016. MT menyampaikan keputusannya pada 6 Mac 2020.

Diputuskan, sebulat suara, seperti berikut:

(1) MT memutuskan bahawa jangka hayat plaintif adalah sepuluh tahun. Pada mulanya, selepas mempertimbangkan testimoni saksi pakar untuk kedua-dua pihak, hakim MT mengambil angka konservatif 16 tahun yang merupakan nilai yang lebih rendah daripada anggaran saksi pakar plaintif jangka hayat. Tetapi hakim kemudian memotong empat tahun dari jumlah 16 tahun tersebut. Hal ini jelas salah dan tidak berasas di mana selepas bermula nilai julat yang lebih rendah untuk mencerminkan pandangan konservatif, empat tahun tersebut tidak sepatutnya ditolak. Hakim MT juga terkhilaf kerana telah membuat potongan satu pertiga lagi untuk kontingensi kerana saksi pakar plaintif telah mengambil kira pelbagai kontingensi sebelum mencapai angka jangka hayat 16 tahun. Oleh itu, jangka hayat dan pengganda hendaklah 16 tahun (lihat perenggan 8, 17, 24–26, 34 & 36–37).

(2) Mengaplikasikan 16 tahun sebagai pengganda, semua award MT yang telah menggunakan sepuluh tahun sebagai pengganda/jangka hayat perlu diubah. Award yang terjejas adalah (seperti yang disenaraikan dalam Jadual Kecederaan yang dilampirkan bersama ini) item 34–37, 46–48, 50–53, item D3 (perbelanjaan perjalanan) dan item D4 (kos penjagaan oleh ahli keluarga) (lihat perenggan 80, 82–83 & 85–92).

(3) Berkenaan dengan ganti rugi khas selama lapan bulan antara tarikh kecederaan (19 Mei 2015) dan tarikh pemfailan tindakan (19 Januari 2016), mahkamah ini mengesahkan award MT sebanyak RM570,120.79 untuk perbelanjaan hospital dan perubatan (item 1 dalam Jadual Kecederaan), RM26,850 untuk akupunktur dan refleksologi (item 7), RM9,350 untuk fisioterapi (item 8), RM68,000 untuk kos penjagaan (item 9) dan RM11,600 untuk pengubahsuaian rumah (penggantian *buckled tiles* — item 10). Award MT sebanyak RM240,000 (RM30,000 x 8 bulan) untuk kehilangan pendapatan (item 3) diketepikan kerana plaintif tidak mengemukakan sebarang bukti dokumentari untuk menyokong tuntutan kehilangan pendapatan. Seksyen 28A(2)(c)(i) Akta Undang-Undang Sivil 1956 ('AUS') menghendaki plaintif membuktikan bahawa dia 'menerima pendapatan dengan pekerjaan sendiri atau aktiviti keuntungan lain sebelum dia cedera'. Atas sebab yang sama, award MT untuk kehilangan pendapatan sebanyak RM1,080,000 antara tarikh pemfailan saman dan tarikh keputusan MT juga diketepikan (lihat item 14 Jadual Kecederaan) (lihat perenggan 38, 40, 43–44, 63–65 & 67–69).

(4) Berkenaan dengan award yang dikira antara tarikh pemfailan tindakan

dan tarikh keputusan MT — yang sebenarnya tempoh 49 bulan dan 16 hari dibundarkan sehingga 50 bulan tetapi MR telah salah menggunakan pengganda 36 bulan — rayuan plaintif untuk mengubah award dengan menggunakan pengganda 50 bulan dibenarkan. Oleh itu, jumlah dalam item 13 dan 15–18 dalam Jadual Kecederaan yang dilampirkan diubah (lihat perenggan 58 & 70–72).

(5) MT tidak memberikan sebarang award untuk nilai penjagaan yang diberikan oleh isteri plaintif, SP2. Dalam rayuan ini, plaintif memohon sejumlah RM762,000 (RM15,240 x 50 bulan). RM15,240 adalah berdasarkan kadar penjagaan kejururawatan komersial setiap jam selama sebulan tolak 25%. Oleh kerana pemberian RM16,000 (iaitu kira-kira RM2,000 sebulan selama lapan bulan) telah dibuat untuk perkara ini di bawah ganti rugi khas yang tidak dirayu oleh mana-mana pihak, mahkamah ini akan memberikan plaintif angka yang sama sebanyak RM2,000 selama 50 bulan yang memberikan jumlah RM100,000. Ini merupakan jumlah yang munasabah untuk nilai penjagaan yang diberikan oleh SP2 (item 19 dalam Jadual Kecederaan) (lihat perenggan 73–76).

(6) Berkenaan dengan peralatan perubatan, peralatan, perubatan dan pemakanan, jumlah yang diberikan adalah berdasarkan jangka hayat peralatan dan kekerapan penggunaan atau penggunaan ubat-ubatan. Oleh kerana hujahan pihak-pihak berkaitan dengan pengganda yang digunakan, mahkamah ini memutuskan bahawa di mana jangka hayat tersebut adalah dua tahun, penggandanya akan menjadi lapan; untuk jangka hayat lima tahun, ia akan menjadi tiga; untuk jangka hayat lapan tahun, ia akan menjadi dua dan untuk jangka hayat sepuluh tahun, akan menjadi dua. Oleh itu, item 20–33, 39, 40, 42 dan 43 dalam Jadual Kecederaan telah diselaraskan dengan penggunaan pengganda yang sesuai (lihat perenggan 78–79).

(7) Pengganda untuk mengira kehilangan pendapatan masa depan plaintif adalah 5.5 (iaitu, 55 tahun tolak 44 tahun (umur ketika dia cedera) dibahagikan dengan dua mengikut s 29A(2)(d)(ii) AUS). Jumlah RM30,000 sebulan yang ditentukan oleh MT adalah pendapatan nominal yang sesuai untuk memberikan plaintif kehilangan pendapatan masa depan memandangkan tiada pertikaian bahawa dia adalah pengarah eksekutif sebuah syarikat sebelum kecederaannya. Oleh itu, jumlah RM1,980,000 (RM30,000 x 12 x 5.5) yang diberikan oleh MT telah disahkan (item D5 dalam Jadual Kecederaan) (lihat perenggan 51–50, 53 & 93).

(8) Award MT sebanyak RM400,000 untuk kesakitan dan penderitaan serta kehilangan kemudahan hidup tidak salah dan disahkan. Walaupun perbezaan antara ganti rugi untuk kesakitan dan penderitaan bergantung pada sejauh mana kesedaran dan kemampuan plaintif untuk menderita,

ganti rugi untuk kehilangan kemudahan akan diberikan untuk kesakitan berkurangan — kerugian besar sama ada plaintif sedar atau tidak. Oleh itu, walaupun plaintif berada di dalam PVS, kesakitan kehilangan kemudahan sama ada disedari atau tidak merupakan adalah kerugian besar (item E dalam Jadual Kecederaan) (lihat perenggann 94–97).

(9) Plaintif menghujahkan bahawa award MT sebanyak RM50,000 untuk kos adalah sangat rendah memandangkan bilangan hari perbicaraan dan penyelidikan yang meluas yang dilakukan oleh peguam. Sebanyak RM350,000 dicadangkan termasuk RM65,063.12 sebagai perbelanjaan di luar poket. Mahkamah ini berpendapat bahawa kos-kos harus termasuk perbelanjaan *getting-up* dan perbelanjaan di luar poket dan jumlah yang munasabah adalah RM100,000 (item terakhir dalam Jadual Kecederaan) (lihat perenggan 98–100).]

Cases referred to

Allen v Waters & Co [1935] 1 KB 200, CA (refd)
Donnelly v Joyce [1973] 3 All ER 475, CA (refd)
Dr Teh Bee Tee v Dr Joshua Mohanraj Daniel & Anor [2018] 11 MLJ 238; [2018] 6 CLJ 616, HC (refd)
Farah Ahmed Naji Al-Sahhaf v Dr Lee Weng Seng & Ors [2017] MLJU 1725, HC (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Henry Siang Len v UKM & 17 Ors (Appeal No W-02(NCVC)(W)-349–02 of 2019) (unreported), CA (refd)
Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)
Latif bin Che Ngah & Anor v Maimunah bte Zakaria [2002] 4 MLJ 266; [2002] 4 CLJ 442, HC (refd)
Lee Yaw Long v Dr Ganapathi Pillai & Ors (82–22–299 of 2003) (unreported) (refd)
Lim Ah Chi v Tan Ah Mui & Anor [1969] 1 MLJ 215, FC (refd)
Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors [2014] MLJU 1922; [2015] 1 CLJ 825, HC (refd)
Page v Sheerness Steel Co plc [1996] PIQR Q26 (refd)
Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals [2017] 4 MLJ 102, CA (refd)
Saripah bt Mahmud lwn Govindaraju a/l Venkatachalam dan seorang lagi [2012] 8 MLJ 686; [2011] 1 LNS 828, HC (refd)
Tang Tiew Yong & Ors v Wong Joon Hoon & Anor [2002] 7 MLJ 420, HC (refd)
Totham v King's College Hospital NHS Foundation Trust [2015] EWHC 97 (QB), QBD (refd)
Wells v Wells; Thomas v Brighton Health Authority; Page v Sheerness Steel Co

A *plc* [1998] 3 All ER 481, HL (refd)
Wong Kuan Kay v Rohaizad Othman & Anor; Majlis Perbandaran Johor Bahru Tengah (third party) & another appeal [2015] 4 CLJ 902, CA (refd)
Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292, FC (refd)
B *Zalizan bin Junoh lwn Yusuf a/l Ngel (seorang yang tidak berupaya diwakili oleh Normah a/p Jendok, isteri dan wakil litigasinya)* [2017] MLJU 2027, HC (refd)

Legislation referred to

C Civil Law Act 1956 s 28A, 28A(2)(c)(i), (2)(d)(ii)

Appeal from: Suit No WA-22NCVC-33–01 of 2016 (High Court, Kuala Lumpur)

Felix Raj (with Ahmad Aizek Busu) (Felix Raj Chambers) in Civil Appeal No W-02(NCvC)(W)-566–04 of 2020 for the appellant.
D *MS Dhillon (with KB Karthi and Jeremy Balang) (PS Ranjan & Co) in Civil Appeal No W-02(NCvC)(W)-572–04 of 2020 for the appellant.*
Felix Raj (with Ahmad Aizek Busu) (Felix Raj Chambers) in Civil Appeal No W-02(NCvC)(W)-572–04 of 2020 for the respondent.
E *MS Dhillon (with KB Karthi and Jeremy Balang) (PS Ranjan & Co) in Civil Appeal No W-02(NCvC)(W)-566–04 of 2020 for the respondent.*

See Mee Chun JCA:

F INTRODUCTION

[1] There are two appeals before us heard together, both on the issue of quantum. They arise from the same medical negligence action. In Appeal 566 G the appellant is Pantai Medical Centre ('D1'). In Appeal 572 the appellant is Fareed Reezal bin Arund suing by his wife and litigation representative ('plaintiff').

[2] The plaintiff was 44 years old when he suffered serious brain injury in H D1's hospital on 19 May 2015. This resulted in him being in a persistent vegetative state (PVS). He was born on 2 December 1970 and turns 55 on 2 December 2025. The judgment of the High Court was delivered on 6 March 2020.

I LIFE EXPECTANCY

[3] We deal first with the issue of life expectancy as that will set the multiplier for various heads of damages.

[4] It is not disputed that PVS is a condition described as 'a clinical condition whereby the patient is not aroused and not aware of the surrounding and the cause of it is a brain injury'. It is also not disputed that the PVS resulted from a non traumatic injury as opposed to traumatic.

[5] Both the parties' quantum experts differed on the life expectancy of the plaintiff. The plaintiff's expert Dr Fazah Akhtar Hanapiah (SP1) gave it as nine to 20 years. D1's expert (Dr Lydia Abdul Latif, SD8) gave it as five to seven years and revised to nine to 12 years.

[6] SP1 had relied on two medical literature for deriving a life expectancy of nine to 20 years. The first was Zasler et al 2007 (Zasler) where a person with PVS in the age group of 40 years may live for another nine years (encl 9/117). The second literature relied on was a study by Jurgen Graf et al 2008 (Graf) which looked at the long term survival of patients following intensive care unit admission after cardiac arrest and estimated to live for another 20 years (encl 9/117).

[7] The expert report of SD8 stated that the life expectancy of PVS based on literature is five to seven years from the event and less than 20% chance to live beyond ten years. Her personal clinical experience of managing patients with disordered consciousness is between the range of five to 12 years. Refer to encl 9/194. She concluded by stating 'life expectancy five to seven years (50%)' (encl 9/195).

[8] The learned High Court judge (HCJ) gave life expectancy to be ten years and stated as follows:

> I am taking a more conservative view derived from Prof Fazah's view of 16 years. (16–4) – 15%: 10.2 (rounded up to 10).

The reference to Prof Fazah was to SP1 who gave a life expectancy of nine to 20 years where the 20 years was derived from Graf. The HCJ took 16 years to be SP1's view and deducted four years. This was attributed to a more conservative view.

[9] Putting that reasoning aside for the moment, we considered the submission by D1's counsel that the reliance on Graf was flawed as that study was based on patients without severe neurological disabilities.

[10] Graf stated:

> ... We believe our study is the first to demonstrate that patients who leave the hospital following cardiac arrest without severe neurological disabilities may expect fair long term survival and quality of life for reasonable expenses to the health care system. (encl 12/76).

A On the face of it, this was therefore a study based on patients without severe neurological disabilities unlike the plaintiff who has PVS.

[11] When it was asked of SP1 if she would agree that the study had an express exclusion it was not dealing with those with severe neurological conditions she replied as follows:

B

> A: The reason why they stated it specifically in their literature is because those with severe neurological conditions cannot answer their quality of life questionnaire. So they can only have the answers from patients who are cognitively alert to answer those questionnaire and that's the only reason why they excluded that out.
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> C
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> Q: But that's a fundamental issue within this literature itself, Doctor. Surely you agree with that.
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> A: Of course. (encl 7/60).

D **[12]** She had earlier on, when asked if that was the key distinction that the plaintiff had suffered severe neurological disabilities but that the study focus was not on such patients and that was the caveat in the literature, explained thus:

> E A: This is a very unique literature. One, it reflects the nearest to what has happened to En Fareed, with having a cardiopulmonary arrest while in hospital. It also has a special section describing specifically for those with neurological disorder. And if you look on page 34 Table 3, this is actually focused on patient with low Glasgow Coma Scale, less than 6. So there is a group of participants within their studies that had poor neurological sequelae as a result of the brain injury. (encl 7/59)

F It was also explained that a GSC score of below six is severe (encl 7/90).

[13] In re-examination she also stated she considered Graf in estimating the plaintiff's life expectancy 'because it was very specific to the group of patients G that reflected how Fareed was or Fareed is at the moment' (encl 7/114).

[14] Hence, the explanation given by SP1 in that Graf was specific to the plaintiff's case is probable in that the study did include patients with severe neurological disorder with GSC of less than six. We find that Graf can thus be H accepted as the basis for a life expectancy with a range up to 20 years. Graf is the relevant supporting medical literature.

[15] It was submitted by D1's counsel that SP1 had admitted in cross-examination that the estimation was speculative. This was when she was I asked by the judge 'There must be some element of speculation' to which she replied 'Yes' (encl 7/62). It must be considered that soon after the judge said that, 'case law has suggested it is a difficult task because you can never be definite. You have to make your judgment call as to what is the life expectancy, you can never be accurate,' to which SP1 said, 'I have to agree with that' (encl

7/63). Granted this was not the typical question and answer, this shows there was nothing definite but does not necessarily show speculation as SP1 used a judgment call to rely on Graf, giving cogent reasons for so doing.

[16] After that line of questioning, SP1 was asked as to whether she was prepared to accept the possibility of between seven to ten years expectancy. She stated that based on her literature the range goes from nine years to 20 years (encl 7/63) and she was firm and consistent in the range.

[17] Although the HCJ only stated he was taking a more conservative view, that was something he could have done. Hence instead of using 20 years as per SP1, he used a conservative 16. There was nothing plainly wrong in taking a more conservative view by taking the lower value of SP1's estimate of life expectancy.

[18] This is also in line with SP1's evidence to a question if she was prepared to accept a possibility of between seven to ten years expectancy as follows:

> A: Again based on my literature the range goes from 9 years to 20 years. If you really want to find that kind of baseline, median point, Graf has actually stated in their literature as well, the median, meaning the middle point of those with neurological deficit is 16.5 years after the event. So meaning that half the patients will live beyond 16.5, another half will not survive after the 16.5, it is a range. (encl 7/63).

The median was arrived at by using 'a life table formula which is a standardised way of measuring life expectancy that is accepted worldwide' (encl 7/91).

[19] As stated by the Federal Court in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 at p 11:

> We are of the view that the standard of proof with regard to the assessment of future loss or damage is on the balance of probabilities but with a lower degree of certainty as to the occurrence of such loss or damage in the future. From the authorities, one can say that such a lower degree to be attached is best termed by the word 'possibility', 'chance', 'risk', 'danger' or 'likelihood', they must also essentially be a substantial one and not speculative, and that the standard of proving such 'possibility', 'chance', 'risk', 'danger" or 'likelihood' of the future damage is still, in our opinion, on a balance of probabilities'.

[20] Hence the standard of proof for future loss or damage is one on a balance of probabilities for which Graf is preferred.

[21] SD8 had revised the plaintiff's life expectancy from five to seven years to nine to 12 years based on her clinical experience. The alternative submission by

D1's counsel was to rely on the nine years as stated in Zasler and that such estimation also corresponds with SD8's revised range. It was further submitted that Zasler had been used in *Farah Ahmed Naji Al-Sahhaf v Dr Lee Weng Seng & Ors* [2017] MLJU 1725 involving a female patient in PVS who was six years old at the time of the incident.

[22] As we had earlier found that Graf could be used as the medical literature to support the basis of life expectancy of a patient in PVS, there was no reason why Zasler ought to be used. In *Farah*, there was no reference to Graf.

[23] When asked to comment on the difference in ranges used by her and SP1, SD8 said Zasler was also included by SP1 and gave the two ranges used and then stated 'so I am not very familiar with that one paper but usually we will look at authors who writes more papers in the field of brain injury and that is notably from Zasler' (encl 9/37). As SD8 was not familiar with Graf she would not be in the best position to say that the range used in Graf cannot be relied on.

[24] However having already started with the conservative value of 16 years, the HCJ then went on to deduct another four years. We find this to be plainly wrong as that was without basis where after having already started at the lower range value to reflect the conservative view, the four years should not be deducted.

[25] The life expectancy should therefore be 16 years.

One third deduction on the life expectancy

[26] The HCJ had deducted 15% from the life expectancy of 16 years.

[27] The plaintiff's counsel had mounted a very vigorous opposition to such deduction. It was argued that once a multiplier had been decided there was no logic or justice in making a further judicial discount. Reference was made to *Wells v Wells; Thomas v Brighton Health Authority; Page v Sheerness Steel Co plc* [1998] 3 All ER 481 at p 497:

> There is no purpose in the courts making as accurate a prediction as they can of the plaintiff's future needs if the resulting sum is arbitrarily reduced for no better reason than that the prediction might be wrong. A prediction remains a prediction. Contingencies should be taken into account where they work in one direction, but not where they cancel out. There is no logic or justice in reducing the multiplier by 15% or 20% on an agreed expectation of life than there would be in increasing it by the same amount.

[28] Reference was also made to *Page v Sheerness Steel Co plc* [1996] PIQR

Q26 where it was stated too that the application of the discount rate was not a rule of law that will bind a lower court.

[29] It has to be noted that *Wells* and *Page* were considered by the Court of Appeal in *Wong Kuan Kay v Rohaizad Othman & Anor; Majlis Perbandaran Johor Bahru Tengah (third party) & another appeal* [2015] 4 CLJ 902 which rejected the application of both cases. This was said at p 914:

> [44] *Wells v Wells* is an important decision and it is regarded as a true admonition of the House of Lords against discounting the mathematical life table ...
>
> [45] The above cases may be useful as a guide to the policy in England but it is not useful in our jurisdiction. Lord Lloyd's remarks in *Wells v Wells* were made in a context where the actuarial tables were available as an alternative to the conventional approach in quantifying the multiplier. In the absence of actuarial tables, the decision of the learned sessions court judge cannot be regarded as erroneous.
>
> [46] The determination of the appropriate multiplier is fraught with difficulty, for it is in large measure pure speculation. However in the absence of actuarial tables, it seems to us that the approach as adopted by our courts making adjustments for contingencies is the next most appropriate approach.

[30] *Wells* was not followed in *Wong Kuan Kay* and a deduction for contingencies appears to remain good law.

[31] We have given anxious consideration to *Wong Kuan Kay* and the reasons advanced as to why there can be deductions for contingencies. One is the absence of actuarial tables where the approach in making adjustments for contingencies is considered the next most appropriate approach.

[32] In pp 912 and 913 the following was said:

> [38] It is important to note that the multiplier is not a real number of years. If a claimant were to be given his or her loss for a real number of years, it would result in considerable over-compensation since that figure would not take into account the effect of a accelerated receipt (ie, the fact that the plaintiff will receive the money at the time the calculation is made, rather than when the expense is actually incurred). Further, the plaintiff may live longer that anyone expected. Therefore, the courts have, as a matter of practice, made reduction for contingencies to cater for accelerated receipt, contingencies and all the variable and uncertainties with regard to the future.
>
> ...
>
> [40] Therefore, the deduction of 1/3 for contingencies by the learned sessions court judge relate essentially to the duration of expense and the possibility that the plaintiff will not require the anticipated level of care for the estimated length of time. To vary an award by the value of the chance the certain contingencies may occur is to assure neither over-compensation nor under-compensation, depending

on whether or not the event occurs. In light of the considerations we have mentioned, we are of opinion that it would be reasonable to allow a discount for contingencies ...

[33] The above passages would indicate that a deduction is allowed to assure neither over-compensation nor under-compensation. If a plaintiff were to be given the loss for a real number of years, it would result in considerable over-compensation since that figure would not take into account the effect of accelerated receipt or the plaintiff living longer than expected.

[34] In this instant appeal we were of the considered opinion that no deduction ought to be made when SP1 had already factored in the various contingencies. These were as follows:

Factors that will effect life expectancy and survival time is multifactorial, which includes:

i. Respiratory condition
ii. Cardiac status
iii. Seizures
iv. Nutritional status
v. Electrolyte imbalance
vi. Skin integrity (pressure ulcers)
vii. Aspiration
viii. Urinary complications/kidney failure
ix. Endocrine function
x. Autonomic regulation
xi. Level of Care given

(encl 9/116)

[35] We considered too that damages are assessed on a once and for all basis. As stated in *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2014] MLJU 1922; [2015] 1 CLJ 825 at p 850:

... The award of future damages or cost of future care in Malaysia is done on once-and-for-all assessment basis, unlike in England where damages may be assessed periodically, following judgment on liability. Thus in Malaysia the victim cannot return to court in the future to claim more damages because his or her injuries have worsened, or if unexpectedly the victim has more needs and the original award had proved inadequate.

[36] To now make a one third deduction would be a further deduction when the contingencies in arriving at the life expectancy by reference to Graf had already been factored. We find the HCJ was plainly wrong to have made the 15% deduction.

Multiplier

[37] We therefore allow a multiplier of 16 years.

Loss of earnings

[38] The HCJ stated 'In the absence of any documentary evidence I am awarding RM30,000 per month from 19 May 2015 to 15.1.2016'.

[39] The plaintiff had claimed a sum of RM74,200 per month for loss of earnings. He was an executive director in Innovative Swift Sdn Bhd (Innovative) and held 92% shares in it.

[40] The evidence at trial was clear in that no documents such as salary slips, bank statements or income tax declarations were produced. The plaintiff's wife (SP2) had admitted to that (encl 8/45). It was also her evidence that his last drawn salary was RM15,500 per month (encl 8/41).

[41] As against this was the plaintiff's 92% shareholding in Innovative which extrapolated from the company's profits for the period April 2014 to May 2015 of RM1,772,802.54 meant his share was RM1,531,595,34 or a monthly sum of RM127,635.95. The profit and loss of accounts are as in encl 38/274–300. Reliance was also placed on the EPF statements of Innovative to show the respective contribution of the employer and the plaintiff (encl 11/162–168). It was submitted that the plaintiff's monthly loss of earnings be calculated on the basis:

> fixed monthly salary (RM15,500) + 92% of the monthly company profits calculated on a monthly basis (RM127,632.95) = RM143,132.95.

[42] The plaintiff sought the amount of RM74,200 on the basis this was the amount pleaded for loss of earnings.

[43] The plaintiff's counsel referred to s 28A(2)(c)(i) of the Civil Law Act 1956 ('the CLA') as follows:

> (2) In assessing damages under this section —
>
> ...
>
> (c) in awarding damages for loss of future earnings the Court shall take into account:

A (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

B

[44] It was said that the plaintiff was in gainful activity in Innovative and was a substantial shareholder. While that may well be so, that provision cannot be said to displace the requirement of proof of the plaintiff's earnings in a gainful activity.

C

[45] The company's accounts ended March 2016 in encl 38/218 at p 221 showed the plaintiff held 92% shareholding. The question is whether this per se entitles him to claim 92% of the profits in the company of RM1,772,802.54 which calculated to RM1,531,595.34 or a monthly sum of RM127,635.95 coupled with the EPF statements. Shorn of any evidence in the form of bank statements, income tax declarations or salary slips, there was therefore no proof. Further it is not necessary that all the profits would have gone to him personally as it may have been ploughed back into the company.

D

E

[46] With regard to the EPF statements which were included in the Bundle of Documents there was no evidence on these statements. SP2 said she was not involved in the preparation but a staff by the name of Nurul Ain was (encl 8/32). It was Nurul's evidence as SP3 she was not involved in the preparation of EPF statements for 2015 (encl 8/123).

F

[47] D1's alternative submission was that the EPF statement in encl 11/162 would show the employers's contribution for the plaintiff in April 2015 was RM1,200. The contribution at 12% per month would show the salary to be RM1,200 x 100/12 = RM10,000. As no salary slips were produced, the plaintiff should only be awarded a nominal sum RM5,000 per month as loss of earnings.

G

[48] There are cases which show that a loss of earnings can succeed in the absence of supporting documents. For instance, the Federal Court in *Lim Ah Chi v Tan Ah Mui & Anor* [1969] 1 MLJ 215 took judicial notice of the income of a 'pow' seller, the High Court in *Saripah bt Mahmud lwn Govindaraju a/l Venkatachalam dan seorang lagi* [2012] 8 MLJ 686; [2011] 1 LNS 828 of a small scale fish and vegetable seller to be RM1,000 and the High Court in *Latif bin Che Ngah & Anor v Maimunah bte Zakaria* [2002] 4 MLJ 266; [2002] 4 CLJ 442 to be RM1,500 for a plasterer. These cases concerned small income earners where documents will not be easily available. Our case concerns a company which generated profits for the period April 2014 to May 2015 of RM1,772,802.54 where documents should thus be available.

H

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[49] Be that as it may, we considered the evidence of SP2 that the plaintiff was the executive director in the company with a monthly salary of RM15,500, car allowance of RM10,000 and petrol allowance of RM1,000 (Q&A 22). They have four children and at the material time the eldest was 18 and the youngest, four (Q&A 7). They reside in a two and half storey house end lot in USJ Heights Subang Jaya (Q&A 57–58).

[50] We find that although there were no documents to prove a monthly salary of RM15,500 and allowances, the fact that he was an executive director in Innovative was not disputed. If that be the case, he must surely have been earning a certain amount of salary to support and sustain a family and maintain a station in life as befits an executive director.

[51] We find the sum of RM30,000 per month as loss of earnings awarded by the HCJ to be appropriate as a nominal sum under the circumstances. The oft quoted principle laid down in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 is if the fact of damage is proved but not its amount, a claimant is entitled to nominal damages. Such an amount is left to be determined by the court taking into consideration the circumstances enumerated above.

Multiplier for loss of earnings

[52] We note that this High Court suit was filed in January 2016 such that it is the pre-amendment s 28A that still applies. Refer to s 6 of the Civil Law (Amendment) Act 2019 which came into force on 1 September 2019.

[53] In respect of loss of earnings the HCJ had awarded the multiplier of eight months for the special damages period, 36 months for the pre-trial period and 5.5 years for the post judgment period. This totalled up to 9.1 years. D1's counsel submitted this was in contravention of s 28A(2)(d)(ii) of the CLA as follows:

> (d) in assessing damages for loss of future earnings the Court shall take into account that:
>
> ...
>
> (ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

Accordingly the multiplier for the plaintiff's loss of earnings should be 55 years – 44 years (age when he was injured)/ 2 = 5.5 years.

[54] In a situation where the plaintiff is no longer able to earn any income

due to his injury, s 28A(2)(d)(ii) of the CLA would apply. We therefore accept the contention of D1 in the light of the clear words of the aforesaid provision. This was also made clear in the High Court case of *Tang Tiew Yong & Ors v Wong Joon Hoon & Anor* [2002] 7 MLJ 420 at p 427 that:

> ... there is no distinction between pre trial and post trial loss of earnings as loss of future earnings should be awarded in relation to the time when the plaintiff was injured; or put it another way, computation of loss of future earnings should commence from the date of injury.

Applying the statutory formula, the court there gave a multiplier of six months.

[55] In this instant case, the multiplier for loss of earnings as per the statutory formula is 5.5 years and the 9.1 years allowed by the HCJ has exceeded that prescribed by s 28A(2)(d)(ii) of the CLA. This is compounded by the 50 months which ought to be used for the pre-trial period instead of the 36 months given. This will be apparent in the next area of discussion.

[56] The Court of Appeal case of *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102 at p 108 which set out the different periods for damages was not in the context of s 28A(2)(d)(ii) of the CLA. This can be confirmed by referring to Annexure A at pp 120 to 125.

DIFFERENT PERIODS FOR DAMAGES

[57] By referring to *Rohgetana* at p 108 there can be different periods regarding damages for the other heads of claims which has always been the case. The periods are the special damages period, the pre-trial and the post judgment period.

[58] In respect of pre-trial damages which is from the date of commencement of the action on 19 January 2016 to the date of delivery of decision on 6 March 2020 as stated by the HCJ, a period of 36 months was given. This clearly is an error in calculation as the period ought to be 49 months and 16 days rounded up to 50 months.

[59] Arising from this is the issue of overlapping as raised by D1. It was submitted that acupuncture and reflexology (item A7) and physiotherapy (item A8) overlapped with physiotherapy (item D2, 48). There was therefore overlapping as the latter also runs from the date of injury. Hence the earlier awards for essentially the same item ought to be set aside. The same argument was advanced for cost of care (item A9 and item B10) and value of care (item B11) which overlapped with cost of nursing care (item D2, 50).

[60] We are of the considered opinion that there is no overlapping as these items all deal with different periods of time namely the special damages period, pre-trial period and the future damages period.

TABLE OF DAMAGES

[61] We now consider the specific heads of damages under appeal which corresponds to the table of damages awarded by the HCJ with reference to the judgment in encl 22/9–14. For case of reference, we have also prepared our table which sets out the HCJ award, the parties' appeals and our award.

[62] We note the urging of the plaintiff's counsel that the aim of damages in negligence is to compensate the victim for his loss and the computation is done by reference to the proper and reasonable cost of supplying that need. Reference was made to *Donnelly v Joyce* [1973] 3 All ER 475 that:

> The loss is the plaintiff's loss. The question from what source the plaintiffs needs have been met, ... are irrelevant ... His loss is the existence of the need for those special boots for those nursing services, the value of which for the purposes of damages — for the purpose of ascertainment of the amount of his loss — is the proper and reasonable costs of supplying those needs ... So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.

SPECIAL DAMAGES

Item 1 — Hospital and medical expenses

[63] The plaintiff claimed RM570,120.79 for which SP2 said they had paid RM306,374 (encl 8/48) and D1 had not disputed such an amount had been received. The issue then is whether the plaintiff should be awarded only what it had paid rather than the amount of RM570,120.79. D1 submitted that as it had been found solely liable, it had no reason or basis to claim against the plaintiff for any outstanding amount.

[64] On the strength of the authorities cited by the plaintiff (*Allen v Waters & Co* [1935] 1 KB 200, *Lee Yaw Long v Dr Ganapathi Pillai & Ors* (82–22–299 of 2003) (unreported) and *Dr Teh Bee Tee v Dr Joshua Mohanraj Daniel & Anor* [2018] 11 MLJ 238; [2018] 6 CLJ 616) there can be a valid claim to recover unpaid medical expenses. The facts in *Dr Teh Bee Bee* differ slightly in that the medical expenses were borne by the employer but the principle can still remain.

[65] The amount of RM570,120.79 is confirmed.

Item 3 — Loss of earnings

[66] In view of our earlier finding that s 28A(2)(d)(ii) of the CLA would apply to a total loss of earnings situation such as that of the plaintiff, the number of years purchase or the base figure is 5.5. The 9.1 years awarded by the HCJ when awarding for the periods of special damages and pre-trial fell into error. We set aside this award. There should only be one award using 5.5 years.

Items 7, 8 and 9 — Acupuncture and reflexology, physiotherapy and cost of care

[67] D1 appears to have no issue with the amount but rather they be set aside for overlapping. As stated earlier there is no overlapping. The award of the HCJ is confirmed.

Item 10 — Home renovation

[68] This was incurred when the home tiles had buckled. Although this buckling happened before the event it was something that still had to be done to avoid the dust from gathering under the tiles before the plaintiff returned home. The amount of RM11,500 is confirmed.

PRE-TRIAL DAMAGES

Item 14 — Loss of earnings

[69] For the reasons given earlier, we set aside this award.

Item 13 — Travel expenses

Item 15 — Medicines and nutritional supplements

Item 16 — Diapers, creams and other personal items

[70] There was no appeal from D1 on these items which meant the base amount was not an issue. The plaintiff appealed on the duration of 36 months which we had earlier found to be 50 months. The plaintiff's appeal for the amounts of RM25,000 (item 13, RM500 x 50 months), RM100,000 (item 15, RM2,000 x 50 months) and RM37,500 (item 16, RM750 x 50 months) is allowed.

Item 17 — Cost of therapies

[71] SP2 had given evidence that she incurred the sum of RM6,547.92 monthly for physiotherapy (RM1,700) and acupuncture (RM4,847.92).

There was no suggestion that such therapies were unnecessary and of no benefit. An amount of RM327,396 (RM6,547.92 x 50 months) is allowed. The same base amount as used by the HCJ is used.

Item 18 — Cost of care

[72] We will only vary the duration and not the base amount of RM8,000 which would be RM400,000 (RM8,000 x 50 months).

Item 19 — Value of care

[73] The HCJ had not made any award on this item. The plaintiff is now seeking RM762,000 (RM15,240 x 50 months). The amount of RM15,240 was a 25% discount from RM20,320 derived from the purported unchallenged evidence of SD8 of nursing care providers charging RM25 hourly for day shifts and RM35 hourly for night shifts and weekends. Reference was made to *Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97 (QB) that care provided by family members should be given at a commercial rate subject to a discount of 25%.

[74] It is clear that value of care can be awarded by a court with the only issue on the amount to be attached to it. Although *Totham* did state a commercial rate with a 25% discount can be given, one has to consider what was the care provided by the family.

[75] In her Q&A 49 SP2 described her involvement in the plaintiff's care in ensuring that his well being is taken off such as feeding and medication and injection is on time and in Q&A 50 she spends on an average three hours a day caring for him which is more on touching, talking and check, encl 9/146–148. This care is to be contrasted with that of nursing care. The subsequent evidence of SP2 in her Q&A 51 shows she has two nurses including one with qualifications in physiotherapy to take care of the nursing needs.

[76] We note that an amount of RM16,000 was made for this item under special damages which was not appealed by either party. This averages to RM2,000 a month. We would therefore award RM100,000 (RM2,000 x 50 months). This would be a reasonable amount premised by SP2's account of the care provided.

LIFE EXPECTANCY AND MULTIPLIER

[77] For the reasons given earlier we find that life expectancy is 16 years.

D1: The cost of equipment, appliances, medicine and nutrition

[78] The amounts awarded were based on the lifespan of the equipment and frequency of consumption or application of the medicines. The amounts appealed from stems from the multiplier used where the plaintiff had used 20 years and D1 nine years.

[79] The number of purchases for equipment where the lifespan is two years will be eight, for a lifespan of five years will be three, for a lifespan of eight years will be two and for a lifespan of ten years will be two. These are in respect of items 20 (hospital bed, RM3,000 x 2 = RM6,000), 21 (alternating pressure mattress, RM8,000 x 2 = RM16,000), 22 (tilt in space wheelchair, RM12,000 x 2 = RM24,000), 23 (commode chair, RM500 x 3 = RM1,500), 24 (electric hoist, RM5,000 x 2 = RM10,000), 25 (shower trolley, RM10,000 x 2 = RM20,000), 26 (suction machine, RM700 x 3 = RM2,100), 27 (nebulizer, RM700 x 3 = RM2,100), 28 (oxygen concentrator, RM5,000 x 3 = RM15,000), 29 (pulse oximeter with alarm, RM300 x 3 = RM900), 30 (digital blood pressure monitor, RM250 x 3 = RM750), 31 (digital ear thermometer, RM150 x 3 = RM450), 32 (glucometer, RM200 x 3 = RM600), 33 (orthotic devices, RM1,500 x 8 = RM12,000), 39 (tilt table and table top, RM10,000 x 2 = RM20,000), 40 (adaptable vehicle with wheelchair anchoring system, RM140,000 x 2 = RM280,000), 42 (home enriching environment, RM5,000 x 2 = RM10,000), and 43 (mobile home monitoring system, RM5,000 x 3 = RM15,000).

[80] The plaintiff s appeal on consumables being on a monthly basis is allowed on 16 years. Item 34 will be varied to RM192,000 (RM1,000 x 12 months x 16). The same too for item 35 on nutritional care to RM134,400 (RM700 x 12 months x 16). The amount for item 36 on PEG tube replacement which has a one year life span will be varied to RM6,400 (RM400 x 16). The amount on item 37 on tracheostomy tube replacement which has a six months lifespan will be varied to RM22,400 (RM700 x 2 x 16). The amount on item 46 for oral baclofen will be varied to RM288,000 (RM1,500 x 12 months x 16).

[81] We confirm the decision that no award be given for item 38 (ceiling mounted hoist) for the reason accepted by the HCJ that the caretaker is competent to move patients using the hoist and commode chair. We further confirm his decision not to award items 44 on intrathecal baclofen pump unit and 45 on intrathecal baclofen drug and refill units for the reason that oral baclofen medication taken daily would be sufficient.

D2: Cost of medical services, therapies and others

Item 47 — Medical consultations

[82] The main issue relates to the cost of a medical consultation. SOB had stated in her report the cost would be RM180 to RM300 (encl 9/196). The HCJ based his award on the basis of RM180 and we find no reason to depart from it. We would only vary to reflect the 16 years for an amount of RM11,520 (RM180 x 4 x 16).

Item 48 — Physiotherapy

[83] As per SD8's evidence, the rates for physiotherapy in her hospital are between RM130 to RM180 and that home physiotherapy is RM220 (encl 9/B2-B3). Frequency of twice a week was not an issue. However the plaintiff contended that home physiotherapy of once a month had not been included when both experts had agreed on it. The amount is therefore varied to RM258,560 (RM130 x 2 x 52 x 16 = RM216,320 + RM220 x 12 x 16 = RM42,240).

Item 49 — Occupational therapy

[84] We confirm the decision of the HCJ not to allow this item as per SD8's evidence that occupational therapy for the plaintiff in PVS where improving the function is not the goal.

Item 50 — Home nursing care

[85] The HCJ had awarded a monthly amount of RM6,000 based on SD8's evidence this would be the sum. SP1's evidence was an estimate of RM8 per hour which would amount to RM5,900. The plaintiff had submitted taking into account SD8's evidence of RM25 hourly rates for daytime and RM35 hourly rates for Sundays and weekends would give an amount of RM20,230.

[86] In this regard we find that SD8's evidence on the hourly rates were in the context of the potential rates for Sundays and weekends. These may be found in encl 9/86. Earlier on she stated nursing care would cost RM6,000. Hence the evidence of hourly rates mean just that and are not to be construed as the evidence for monthly nursing care.

[87] The amount will be varied only on the duration to RM1,152,000 (RM6,000 x 12 x 16).

A Item 51 — Respite care

[88] The only issue was on the duration. We vary the amount to RM80,000 (RM5,000 x 16).

B Item 52 — Ambulance services

[89] The only issue was on the duration. We vary the amount to RM19,200 (RM150 x 8 x 16).

C Item 53 — Hospital admissions

[90] The issues were on duration and whether this was required once or twice a year. On the basis of SD8's report that the plaintiff may require hospital admissions one to two times a year, the amount is varied to RM320,000 (RM10,000 x 2 x 16).

D

Travel expenses

E **[91]** It was contended the amount of RM120,000 ought to be set aside. We note however there was no appeal by D1 on this but only on the duration. We vary the amount to RM192,000 (RM12,000 x 16).

Value of care

F

[92] For the reasons given earlier on pre-trial value of care, we do not agree with the monthly amount of RM15,240. We vary the amount to reflect the duration to RM288,000 (RM18,000 x 16).

G *Future loss of earnings*

[93] For the reasons given earlier, we allow loss of earnings to be calculated in accordance with s 28A(2)(d)(ii) of the CLA where the number of years purchase or the base figure is 5.5 years. The amount as awarded by the HCJ of RM1,980,000 (RM30,000 x 12 x 5.5) is confirmed.

H

PAIN AND SUFFERING AND LOSS OF AMENITIES OF LIFE

[94] The HCJ awarded RM400,000. The plaintiff contends it should be RM500,000 where the quantum for pain and suffering and loss of amenities of life for a brain damage and its sequelae range from RM500,00 (*Henry Siang Len v UKM & 17 Ors* in Court of Appeal No W-02(NCVC)(W)-349–02/2019 (unreported)) and RM400,000 (*Farah* — brain damaged infant, multiplier of five years).

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[95] D1 contends it to be to between RM180,000 to RM240,000. This was on the basis that the Revised Compendium of Personal Injury Awards dated 6 July 2018 gives bedridden state with awareness a range of RM300,000 to RM420,000 and PVS (coma) a range of RM180,000 to RM240,000. In *Zalizan bin Junoh lwn Yusuf a/l Ngel (seorang yang tidak berupaya diwakili oleh Normah a/p Jendok, isteri dan wakil litigasinya)* [2017] MLJU 2027 the plaintiff was in a bedridden state with awareness and was awarded RM380,000.

[96] As noted in *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292 referred to in *Zalizan*, the distinction between damages for pain and suffering is that it depends on the plaintiff's personal awareness and capacity for suffering but damages for loss of amenities are awarded for the pain of deprivation-a substantial loss whether the plaintiff is aware or not. Hence even if the plaintiff is in PVS, the pain of deprivation of the loss of amenities whether or not he is aware of it is a substantial loss. This is when compared to the infant in *Farah*, he has had a full appreciation of life.

[97] Under the circumstances we find the award of RM400,000 to be not plainly wrong.

COSTS

[98] Costs of RM50,000 was awarded. The plaintiff contended this was a manifestly low sum when compared to 36 days of non consecutive days of trial, 13 witnesses including five experts and extensive research. A sum of RM350,000 for costs including RM65,063.12 as out of pocket expenses was suggested. It was explained the plaintiff had no opportunity to submit on the issue of costs.

[99] The response of D1 was that the suggested costs was to cover the costs of suing all five defendants. The claim against D3 to D5 was withdrawn before trial while the claim against D2 was dismissed. The plaintiff could have submitted on costs during the submissions or even during the oral submissions or before the date of decision.

[100] We are of the considered opinion that costs should include getting up and out of pocket expenses and that a reasonable amount would be RM100,000.

A CONCLUSION

[101] For the above reasons and as per the Table of Damages annexed, some parts of the plaintiff's appeal are allowed and the rest dismissed. The same goes for D1.

B

[102] We further award costs of RM20,000 to the plaintiff for each appeal, subject to allocatur.

ANNEXURE: TABLE OF DAMAGES

C

No	Item	High Court	Defendant 1 in Appeal 566	Plaintiff in Appeal 572	The Court of Appeal
A	Special damages (8 mths: From 19 May 2015 to 19 Jan 2016)				
1.	Hospital and medical expenses	RM 570,120.79	RM306,354	No appeal	D1's appeal dismissed. RM 570,120.79
2.	Travelling expenses	RM 15,364.54	No appeal	No appeal	–
3.	Loss of earnings	RM240,000 (RM30,000 x 8 mths)	Nil-or-Only a Nominal amount	RM593,600 (RM74,200 x 8 mths)	P's appeal dismissed. HCJ award set aside
4.	Machines, appliances and equipment	RM 15,092.95	No appeal	No appeal	–
5.	Medicines And nutrition	RM2,022.70	No appeal	No appeal	–
6.	Diapers, wipes, etc	RM6,000	No appeal	No appeal	–
7.	Acupuncture and reflexology	RM26,850	nil	No appeal	D1's appeal dismissed. RM26,850

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8.	Physio therapy	RM9,350	Nil	No appeal	D1's appeal dismissed. RM9,350
9.	Cost of care	RM68,000	Nil	No appeal	D1's appeal dismissed. RM68,000
10.	Home renovations	RM11,600	Nil	No appeal	D1's appeal dismissed. RM11,600
11.	Cost of services by the plaintiff's wife	RM16,000	No appeal	No appeal	–
12.	The cost of holiday	Not allowed	No appeal	No appeal	–
B	Pre-trial damages (from 19 January 2016 to 6 March 2020)			*appeal only on duration	
	Duration	36 mths	No appeal	50 mths	P's appeal allowed. 50 mths
13	Travelling expenses	RM18,000 (RM500 x 36 mths	No appeal	RM25,000 (RM500 x 50 mths)	P's appeal allowed. RM25,000
14.	Loss of earnings	RM1.08m (RM30,000 x 36 mths)	Nil-or-Only a nominal amount	RM3.71m (RM74,200 x 50 mths)	P's appeal dismissed. HCJ award set aside.
15.	Medicines and nutritional supplements	RM72,000 (RM2,000 x 36 mths)	No appeal	RM100,000 (RM2,000 x 50 mths)	P's appeal allowed. RM100,000
16.	Diapers, creams and other personal items	RM27,000 (RM750 x 36 mths)	No appeal	RM37,500 (RM750 x 50 mths)	P's appeal allowed. RM37,500

17.	Cost of therapies	RM235,725 (RM 6,547.92 x 36 mths)	Nil	RM 327,396.60 (RM 6,547.92 x 50 mths)	D1's appeal dismissed. P's appeal allowed. RM327,396
18.	Cost of care	RM288,000 (RM8,000 x 36 mths	Nil	RM1.016m (RM20,320 x 50 mths	D1's appeal dismissed. P's appeal allowed for lesser amount RM400,000 (RM8,000 x 50 mths)
19.	The value of care by the plaintiff's wife	Not allowed	No appeal	RM762,000 (RM15,240 x 50 mths)	P's appeal allowed for lesser amount. RM100,000 (RM2,000 x 50 mths)
C	The multiplier	10 (16 yrs less 4 yrs and less 15%)	6 (9 years less 1/3)	20 (no deductions)	16 years
D	Future Damages				
D1	The cost of equipment, appliances, medicine and nutrition				
20.	Hospital bed (10 yrs lifespan)	RM3,000	RM3,000	RM6,000 (RM3,000 x 2 purchases)	P's appeal allowed. RM6,000
21.	Alternating pressure mattress (8 yrs lifespan)	RM16,000 (RM8,000 x 2 purchases)	RM8,000	RM24,000 (RM8,000 x 3 purchases)	Both appeals dismissed. RM16,000
22.	Tilt-in-space Wheelchair (10 yrs lifespan)	RM12,000	RM12,000	RM24,000 (RM12,000 x 2 purchases)	P's appeal allowed. RM24,000

23.	Commode chair (5 yrs lifespan)	RM1,000 (RM500 x 2 purchases)	RM1,000 (RM500 x 2 purchases)	RM2,000 (RM500 x 4 purchases)	P's appeal allowed for lesser amount RM1,500 (RM500 x 3)
24.	Electric hoist (10 yrs lifespan)	RM5,000	RM5,000	RM10,000 (RM5,000 x 2 purchases)	P's appeal allowed. RM10,000
25.	Shower trolley (8 yrs lifespan)	RM20,000 (RM10,000 x 2 purchases)	RM10,000	RM30,000 (RM10,000 x 3 purchases)	Appeals dismissed. RM20,000
26.	Suction machine (5 yrs lifespan)	RM1,400 (RM700 x 2 purchases)	RM1,400 (RM700 x 2 purchases)	RM2,800 (RM700 x 4 purchases)	P's appeal allowed for lesser amount. RM2,100 (RM700 x 3)
27	Nebulizer (5 yrs lifespan)	RM1,400 (RM700 x 2 purchases)	RM1,400 (RM700 x 2 purchases)	RM2,100 (RM700 x 4 purchases)	P's appeal allowed for lesser amount. RM2,100 (RM700 x 3)
28.	Oxygen concentrator (5 yrs lifespan)	RM10,000 (RM5,000 x 2 purchases)	RM10,000 (RM5,000 x 2 purchases)	RM15,000 (RM5,000 x 4 purchases)	P's appeal allowed for lesser amount. RM15,000 (RM5,000 x 3)
29.	Pulse oximeter with alarm (5 yrs lifespan)	RM600 (RM300 x 2 purchases)	RM600 (RM300 x 2 purchases)	RM1,200 (RM300 x 4 Purchases)	P's appeal allowed for lesser amount. RM900 (RM300 x 3)
30.	Digital blood pressure monitor (5 yrs lifespan)	RM500 (RM250 x 2 purchases)	RM500 (RM250 x 2 purchases)	RM1,000 (RM250 x 4 purchases)	P's appeal allowed for lesser amount RM750 (RM250 x 3)

31.	Digital ear thermometer (5 yrs lifespan)	RM300 (RM150 x 2 purchases)	RM300 (RM150 x 2 purchases)	RM600 (RM150 x 4 purchases)	P's appeal allowed for lesser amount. RM450 (RM150 x 3)
32.	Glucometer (5 yrs lifespan)	RM400 (RM200 x 2 purchases)	RM400 (RM200 x 2 purchases)	RM800 (RM200 x 4 purchases)	P's appeal allowed for lesser amount. RM600 (RM200 x 3)
33.	Orthotic devices (2 yrs lifespan)	RM7, 500 (RM1,500 x 5 purchases)	RM4,500 (RM1,500 x 3 purchases)	RM15,000 (RM1,500 x 10 purchases)	Both appeals dismissed. RM12,000 (RM1,500 x 8)
34.	Consumables (monthly)	RM120,000 (RM1,000 x 12 mths x 10)	RM72,000 (RM1,000 x 12 mths x 6)	RM240,000 (RM1,000 x 12 mths x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM192,000 (RM1,000 x 12 mths x 16)
35.	Nutritional care (monthly)	RM84,000 (RM700 x 12 mths x 10)	RM50,400 (RM700 x 12 mths x 6)	RM168,000 (RM700 x 12 mths x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM134,400 RM700 x 12mths x 16)
36.	PEG tube replacement (1 yrs lifespan)	RM4,000 (RM400 x 10)	RM2,400 (RM400 x 6)	RM8,000 (RM400 x 20)	D1's appeal dismissed.

					P's appeal allowed for lesser sum. RM6,400 (RM400 x 16)
37.	Tracheostomy tube replacements (6 months lifespan)	RM14,000 (RM700 x 2 x 10)	RM8,400 (RM700 x 2 x 6)	RM28,000 (RM700 x 2 x 20)	P's appeal allowed for lesser amount. RM22,400 (RM700 x 2 x 16)
38.	Ceiling mounted hoist (10 yrs lifespan)	Not allowed	No appeal	RM24,000 (RM12,000 x 2 purchases)	P's appeal dismissed.
39.	Tilt table and table top (10 yrs lifespan)	RM10,000	RM10,000	RM20,000 (RM10,000 x 2 purchases)	P's appeal allowed. RM20,000
40.	Adapted vehicle with wheelchair anchoring system (10 yrs lifespan)	RM 140,000	RM140,000	RM280,000 (RM140,000 x 2)	P's appeal allowed. RM280,000
41.	Ramps	RM5,000	No appeal	No appeal	–
42	Home enriching environment (10 yrs lifespan)	RM5,000	RM5,000	RM10,000 (RM5,000 x 2 purchases)	P's appeal allowed. RM10,000
43.	Mobile home monitoring system (5 yrs lifespan)	RM10,000 (RM5,000 x 2)	RM5,000	RM20,000 (RM5,000 x 4 purchases)	P's appeal allowed for lesser amount. RM15,000 (RM5,000 x 3)

44.	Intrathecal baclofen pump unit (5 yrs lifespan)	Not allowed	No appeal	RM36,000	P's appeal dismissed.
45	Intrathecal baclofen drugs and refill kits	Not allowed	No appeal	RM75,000 (RM15,000 x 5)	P's appeal dismissed.
46.	Oral baclofen (monthly)	RM180,000 (RM1,500 x 12 mths x 10)	RM108,000 (RM1,500 x 12 mths x 6)	RM360,000 (RM1,500 x 12 mths x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM288,000 (RM1,500 x 12 mths x 16)
D2	Cost of medical services, therapies and others				
47.	Medical consultations (4 times a yr)	RM7,200 (RM180 x 4 x 10)	RM4,320 (RM180 x 4 x 6)	RM24,000 (RM300 x 4 x 20)	D1's appeal dismissed. P's appeal for lesser amount allowed. RM11,520 (RM180 x 4 x 16)
48.	Physio therapy (twice a week)	RM104,000 (RM100 x 2 x 52 x 10)	RM62,400 (RM100 x 2 x 52 x 6)	RM427,200 (RM180 x 2 x 52 x 20) including for home physio therapy — RM220 x 12 x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM258,560

					(RM130 x 2 x 52 x 16 = RM216,320, including home physiotherapy (RM220 x 12 x 16 = RM42,240)
49.	Occupational therapy (twice a week)	Not allowed	No appeal	RM208,600 (RM100 x 2 x 52 x 20)	P's appeal dismissed.
50.	Home nursing care (monthly)	RM720,000 (RM6,000 x 12 x 10)	RM432,000 (RM6,000 x 12 x 6)	RM 4,876,800 (RM20,320 x 12 x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM1,152,000 (RM6,000 x 12 x 16)
51.	Respite care (yearly)	RM50,000 (RM5,000 x 10)	RM30,000 (RM5,000 x 6)	RM100,000 (RM5,000 x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM80,000 (RM5,000 x 16)
52.	Ambulance services (8 trips a yr)	RM12,000 (RM150 x 8 x 10)	RM7,200 (RM150 x 8 x 6)	RM24,000 (RM150 x 8 x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM19,200 (RM150 x 8 x16)

53.	Hospital admissions (yearly)	RM100,000 (RM10,000 x 10)	RM60,000 (RM10,000 x 6)	RM400,000 (RM10,000 x 2 x 20)	D1's appeal dismissed. P's claim allowed for lesser amount. RM320,000 (RM10,000 x 2 x 16)
D3	Travel expenses	RM120,000 (RM12,000 x 10)	RM72,000 (RM12,000 x 6)	RM240,000 (RM12,000 x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM192,000 (RM12,000 x 16)
D4	The value of care by family members	RM180,000 (RM18,000 x 10)	Nil	RM 3,657,600 (RM15,240 x 12 x 20)	D1's appeal dismissed. P's appeal allowed for lesser amount. RM288,000 (RM18,000 x 16)
D5	Future loss of earnings	RM1.98m (RM30,000 x 12 mths x 5.5)	Nil-or-Only a nominal amount	RM 4,897,200 (RM74,200 x 12 mths x 5.5)	Both appeals dismissed. RM1,980,000
E.	Pain and suffering and loss of amenities of life	RM400,000	Between RM180,000 and RM240,000	RM500,000	Both appeals dismissed. RM400,000

	Costs	RM50,000	No appeal	RM350,000 (including RM 65,036.12 as out of pocket expenses)	P's appeal on costs for lesser amount allowed. RM100,000

Order accordingly.

Reported by Ashok Kumar